IN THE

Supreme Court of the United States

CITY OF SEATTLE, *Appellant*,

vs.

DANIEL KELLEHER, as Administrator of JOHN W. THOMPSON, deceased, *Appellee*.

PETITION FOR REHEARING OR FOR MODIFICATION.

Appellee respectfully moves the court for an order granting a rehearing or for a modification of the judgment, on the ground that the opinion requires only reversal of the decree while the judgment as entered requires dismissal of the bill. The Appellee on the following showing believes that the ends of justice will appear to your Honors to be more fully subserved by allowing further proceedings below.

FREDERICK BAUSMAN,
Counsel for Appellee.

PETITION FOR REHEARING OR FOR MODIFICATION.

By the charter of Seattle in force when the original work was petitioned for (1889) and the ordinance (February, 1890) provided for it, it was provided that if upon any suit by the city to enforce its lien, there should appear defects, informalities, or irregularities prejudicial to the objecting party, the court might disallow the city its costs, while, "if the proceedings appeared to have been *regular*," the city might add ten per cent. per annum from the date of the delinquency, with five per cent. additional as a penalty. (Rec. p. 6). Under this our state supreme court forbade interest and penalty in a case in this very district where the proceedings did not appear regular. *Seattle vs. Hill*, 23 Washington 92. The spirit of the regulation was this. There would be cases in which the question whether the assessment was legal might be a very close one, on account of irregularities so grave as sometimes to amount to invalidity and in others to come very near it, so that it would often happen that the party who contested the assessment, and thus got himself into delinquency, was not unreasonable. Such persons, the charter intended, should not be mulcted for making a defense where defense was natural.

So reasonable a regulation was, however, insufficient for the temper of a city which, if the present be a fair illustration, was not disposed to create districts in the nicest justice to those who composed them. Accordingly, the new charter under which, by statute of 1893, the reassessment was made in this case, determined to put such as might, like ourselves, question the fairness of a district, in a position to fare hard for arguing about it. It re-

solved to make a hearing expensive. This new charter struck out the conditional feature of the ten per cent. interest and five per cent. penalty, and made it mandatory.*

The result of it all is that the objector in the present instance now stands confronted with ten per cent. interest for ten years and five per cent. penalty upon the original amount, all this for refusing to pay his share of a tax which the judge of the lower court, familiar with the situation, pronounced to be more or less an outrage, which two justices of the supreme court of the country dissent from enforcing, and which the writer of the present opinion concedes to be *prima facie* "an unwarrantable attempt to make one man pay for another man's convenience." In other words, where no fair-minded man can doubt we were justified in calling for judicial inquiry, we are obliged to pay more than double for making that inquiry. The assessment of something above $14,000 is now made to exceed $30,000.

It seems to us that this court will be in a humor to permit the objecting Appellee to obtain, by any further proceedings in this cause, whatever relief the lower federal court may yet find in its power. For this reason, we ask your Honors to modify the judgment now entered, which requires a dismissal of our bill.

"* * * and that *unless payment is made within thirty days* from the date of such notice such assessment shall become delinquent and shall *bear interest at the rate of* 10 *per cent. per annum* until paid, *and if not paid before such assessment shall have become delinquent, a penalty of* 5 *per cent. shall* be added, and the sums delinquent shall be entered on the annual tax roll for the current year against each lot and parcel so delinquent, and, with the interest, collected as other taxes, separate account being kept thereof, and if not paid within the time fixed for the payment of city taxes, shall be collected as charges or penalties as are authorized to be charged and collected on other delinquent taxes, and each lot or parcel so delinquent shall be sold for the amount of such assessment, with interest and costs, at the time and in the manner and by the same authority as lands and lots are sold for city taxes."—Charter of Seattle, March 8, 1892.

Your Honors' opinion conceding that the thing looks unjust on its face (or as you more strongly express it, unwarrantable), conceding also that the judge of the lower court regarded it as manifest injustice, and conceding that his opinion being local should carry great weight, still counterbalance all this by presuming that there must be some thing or other in fact to justify it. But, your Honors, this presumption appears to us to be at least unexpected. That a presumption exists in favor of discretion exercised by the board that creates a district, we admit, and it is quite clear that he who attacks must be prepared to make a showing. Supposing such a district to look reasonable on its face, the attacking party, it appears to us, would be making some progress when he introduced proof to show that, though fair on its face, the district was unfair in fact. Having introduced a reasonable degree of proof upon that point, he would shift the burden of proof, we think, to the city to explain. Similarly in our own case, where the thing on its face is unfair, and indeed provokingly unjust unless explained, (when in fact we are made to pay one-half of a planking which terminated a fifth of a mile from the edge of our tract, and nearly half a mile from its average distance), it does seem to us that the city should do the explaining, and show affirmatively whether this thing was just or not. If in this supposition we were wrong, the error was certainly not unreasonable, nor can we be blamed for not anticipating your suggestion that one way in which the city could offset the unreasonableness of the plan would be by showing that more money was expended in one quarter than in another by the distribution of cuts or fills.

Accepting, now, the suggestion of the court, we ask your Honors whether you cannot with justice save us

from the severe penalty of not having anticipated it, in other words, remand this cause, not for dismissal, but for further proceedings upon the point suggested by your Honors. Your opinion merely "reversed" the decree, but the judgment as entered, we find, commands a dismissal of the bill. The heirs of the deceased Thompson are ready to contest. We are ready and feel abundantly strong to show by proof that this inequality, instead of being reduced by actual facts, is in truth much worse, and that the opinion of the trial judge respecting it is more than justified by all the facts when put in evidence.

Nor is it unfair in us to suggest that if any escape be afforded from the subsequent charter and the mandatory interest, the lower court be permitted to accept our tender of the principal if irregularities in the assessment ingredients or proceedings appear, as indeed we think they already appear in the inclusion of a planking that could be charged only against the general funds of the city.

Who is to lose by this delay? Who can say that it will be wrong to give us additional opportunity for proof? It is not the city that can lose by this, or any holder of its warrants. It is only the Thompson heirs. It is not the city, because that vindictive interest of ten per cent. and that penalty of five per cent. remain as an abundant compensation to the town or to the holders of its district warrants. It is only the Thompson heirs who will have to pay in the future, as under your Honors' opinion they may severely have to pay for the past, in this respect. It seems to us that upon such terms as these the court may feel it should give the contestant every possible opportunity to make good his claim. So far as the writer of this petition can recollect, the present is the first instance of a district in which one part received a form of pavement and the other none. Even in *French vs. Bar-*

ber Asphalt Company, where you affirmed the lower court in sustaining a district plan, you quoted the language of the lower court to the effect that the pavement was "uniform in distance and quality throughout the district." Certain it is that instances so harsh as this and so apparently founded in partiality must not be encouraged. When they are found, every possibility of fair defense should be given, especially when, as here, the contestant is required to reimburse the city heavily for his pains.

Your Honors concede that the lower court, which stamped this district as "manifestly" unjust, might have good reasons in his local knowledge for saying so. Is it improbable, then, we shall make him right by proof? In granting us further proceedings below, does the indulgence appear useless on its face?

Respectfully submitted,

FREDERICK BAUSMAN,
Counsel for Appellee.

I, Frederick Bausman, counsel for Appellee, do hereby certify this 15th day of December, 1904, that the foregoing petition is made in good faith, not for delay, and that the same appears to me well founded in law.

FREDERICK BAUSMAN.